Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Ray Sienkiewicz,

Petitioner,

v.

Larry Hart, individually, Charles Wilson, individually, Janet Reno, individually, William J. Clinton, individually, and Jill Babyack,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Should the Supreme Court curtail widespread abuse of *Roe v. Wade* which has resulted in innumerable coerced and forced abortions by restoring FACE protection to referral counselors?

II

Should the Supreme Court nullify the blueprint for avoidance of liability for nationwide criminal activity by top government officials which utilizes the appointment of a key participant to the U.S. Court of Appeals ?

III

Should the Supreme Court resolve conflicts between the federal appeals circuits which favor the FACE protection of pro-abortion workers over those pro-life workers lawfully providing reproductive health services in the same facility?

PARTIES TO THE PROCEEDING

"Petitioner"

Ray Sienkiewicz

"Respondents"

Larry Hart, individually, Charles Wilson, individually, Janet Reno, individually, William J. Clinton, individually, and Jill Babyack

CORPORATE DISCLOSURE STATEMENT

No corporation is a party to these proceedings.

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Petitioner, Ray Sienkiewicz, respectfully requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the district judge of the District Court in *Ray Sienkiewicz v. Larry Hart, individually, Charles Wilson, individually, Janet Reno, individually, William J. Clinton, individually, and Jill Babyack*, Case Number 2:00-CV-57-FTM-29DNF is shown at Appendix A. The decision of the United States Court of Appeals for the Eleventh Circuit, in *Sienkiewicz v. Hart, et al.*, Case Number: 01-11774-J, is shown as Appendix B.

STATEMENT OF JURISDICTION

Ray Sienkiewicz filed an action for violation of his civil rights under 18 U.S.C. §248 (Freedom of Access to Clinic Entrances Act) in U.S. District Court Middle District of Florida, Ft. Myers Division, pursuant to 28 U.S.C. §1391(b), because the claim arose in that district and also because some of the defendants resided in that district. There is federal jurisdiction because this claim arises under the laws of the United States according to 28 U.S.C. §1331. Additionally, since this is an action to recover damages under an act of Congress providing for the protection of civil rights, jurisdiction was proper in the District Court under 28 U.S.C. §1343(a)(4).

The appeal was taken to the United States Court of Appeals, Eleventh Circuit, under the authority of 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III of the United States Constitution, which states in pertinent part:

Section 1. . The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour .

This case involves the federal statute called Freedom of Access to Clinic Entrances Act, (F.A.C.E.) 18 U.S.C.§ 248, which states in pertinent part:

> (a) **Prohibited activities.** - Whoever -
>
> **(1)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;
>
> (c) **Civil remedies.** -
>
> **(1) Right of action**.-
>
> **(A) In general.**-Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . .
>
> **(e) Definitions.**- As used in this section:
>
> **(1) Facility.**- The term "facility" includes a

hospital, clinic, physicians office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(5) Reproductive health services.- The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

There is also reference to the federal statute providing for the disqualification of justices, judges, or magistrates under 28 U.S.C. §455, which states, in pertinent part :

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

1. Where he has a personal bias or prejudice concerning a party . . .

4. He knows that he . . .has . . .any other interest that could be substantially affected by the outcome of the proceeding;

STATEMENT OF THE CASE

A. Background.

"Freedom of Choice" has been a great slogan for the abortion industry. The words "freedom" and "choice" inspire most Americans to believe that Abortion is the product of our greatest ideals. Sadly, this view is an illusory one. For a great many young women - - perhaps the majority of those undergoing over 40,000,000 abortions in America since January, 1973 - - their abortions were not a matter of choice. This case is shines light on this great dark secret.

Most of the judicial decisions in the abortion war have concerned the opportunities available to protestors worried about the unborn child or with limitations imposed on the abortion industry. Little or nothing was heard in the federal courts from the young women with legitimate claims of harm.

Those persons with pro-life beliefs focused their efforts for many years on legislative changes which would restrict or outlaw abortions in this land and on marches and mass demonstrations.

As the years went by, more pro-lifers began protesting at abortion clinics. There, they viewed the pregnant woman as being in league with the abortionist in the murder of her unborn child.

About fifteen years ago, leaders such as Randall Terry and Joseph Scheidler emerged at the forefront of the pro-life movement. They initiated what became known as the "Rescue Movement".

Tens of thousands of frustrated pro-life activists took

part in "rescues" all across the United States in an effort to shut down abortion clinics, by utilizing large numbers of people sitting in the entrances to obstruct access.

Litigation against rescue leaders reached the Supreme Court in *Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516 (1994), and *Schenck v. Pro Choice Network*, 519 U.S. 357 (1997). Prophetically, these cases set the stage for the metamorphosis of concerned pro-life activists into referral counselors. For that matter, so did FACE.

In the early 1990's, the abortion industry prevailed upon a sympathetic president and Congress for legislation which would ensure that the U.S. Department of Justice would be the main source of protection for the abortion industry.

The result in 1994 was the passage of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §248, which provided devastating civil and criminal consequences for those who interferewith reproductive health services, such as referral and counseling, in appropriate facilities.

There was a flurry of legal assaults challenging the constitutional validity of FACE. Perhaps the leading case was *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995), filed in the Middle District of Florida against Charles Wilson, then the U.S. Attorney, and Janet Reno, both of whom are respondents here. The U.S. Court of Appeals, Eleventh Circuit, agreed with the District Court that FACE was constitutional.

FACE, with its court-anointed validity, brought about some major changes in the pro-life activities at abortion clinics:

1. "The Rescue Movement" dissolved. Most of the

rescuers were parents who could not justify long terms in prison away from their families as the price for opposing Abortion.

2. Some of the activists shifted to counseling as a result of the disturbing knowledge that they had acquired at abortion clinics, Instead of protesting the destruction of the child, counselors became advocates for the pregnant woman and the need to protect them.

3. The counselors sought formal training in order to do a better job of helping women at abortion clinics.

4. The increased sophistication of these counselors gave rise to their professionalism.

5. The referral counselors determined to seek the protection of our legal system for their loving and lawful activities.

With increased contact with the pregnant women at abortion clinics, these counselors learned some awful truths:

1. The level of sanitation at some clinics was deplorable; consequently, the risk of sexually transmitted diseases and of AIDS was considerable.

2. State and federal authorities were reluctant to supervise and regulate abortion clinics for fear that they would suffer from criticism by the media and devastating lawsuits from the abortion industry.

3. Few women knew that there were more and more

opportunities which provided alternatives to abortion, such as crisis pregnancy centers, and post-abortion help, such as suicide prevention centers to help women cope with the post-abortion syndrome.

4. Abortion alternative providers had virtually no public relations or advertising funds.

5. A great many employers, self-centered boyfriends, selfish husbands, school officials, and others with the power to control young women's decisions, were forcing, tricking or coercing them into abortions. (Please note the Washington Post article in the Selected Exhibits. Also, the excerpts from Randy Alcorn's Pro-Life Answers to Pro Choice Arguments.)

6. Many unsuspecting young women did not know that abortion clinics have deceptive, innocent sounding names such as "A Woman's World" or "Aware Woman Center For Choice".

7. Assembly line abortions were becoming the norm. (Please see the *Adams* case in the Selected Exhibits.)

8. Pregnant women at abortion clinics were having no contact whatsoever with the doctor: they dealt only with low echelon employees with little or no training and with little or no compassion or concern for them. (Please see *Adams*.)

9. Abortion clinics were owned by business people with concern only for the 'bottom line" and with no sense of professionalism or standards for reputable behavior.

10. Any abortion clinic-supplied counseling was a

farce in that any employee would be fired instantly for referral of a pregnant customer to those providing alternatives to abortion.

11. Many abortion clinics lacked malpractice insurance; the operating organization was often a "throw-away" corporation.

12. Often the abortionist had no hospital privileges; in the event of a major mistake requiring that the pregnant woman be taken to an emergency room, the abortionist literally washed his or her hands of this customer.

Ray Sienkiewicz himself of training to become a referral counselor. He subscribed to the professional standards of REACH, the referral counselors' organization. For two years, he was assigned to the Ali Azima abortion clinic in North Ft. Myers where he offered loving assistance to all the pregnant women and warned them of the particular hazards which they would encounter there and referred them to local community resources, such as crisis pregnancy centers, homes and shelters.

This counselor and many like him so reduced the number of abortions that the help of William J. Clinton and Janet Reno was enlisted by a panic-stricken abortion industry.

Charles Wilson became the point man charged with thwarting the referral counselors. After reviewing the facts, he reportedly notified Janet Reno that the counselors were not violating any laws and that the U.S. Department of Justice was powerless to stop counselors such as Ray Sienkiewicz.

A scheme was then concocted by Clinton, Reno and Wilson whereby the U.S. Attorneys would be told to enlist

local law enforcement agencies in an effort to harass, threaten, and intimidate referral counselors such as Ray Sienkiewicz in order to prevent them from providing FACE-protected services in abortion facilities. This would solve the problem for the abortion industry.

But how, these conspirators wondered, could they evade prosecution for violating FACE ? The answer was to control the decisions of the federal courts, both trial and appellate, in the Eleventh Circuit. The means: initiate the Wilson plan only after his appointment to the Court of Appeals was assured.

Thus it came to be that Wilson had two roles to play: first, he was the initial U.S. Attorney to corrupt local law enforcement officials such as Sheriff John McDougall of Lee County, Florida and the Ft. Myers Chief of Police, Larry Hart. Second, he received the appointment to the U.S. Court of Appeals, Eleventh Circuit, as an insurance policy providing himself, Reno and Clinton with whatever legal absolution they might need. He performed these roles admirably, even though the risk turned out to be much greater than any of these three anticipated.

The first abortion clinic to be rendered devoid of counselors under the Wilson plan was the one run by Dr. Ali Azima in North Ft. Myers. There, Teresa Ann Tremelling suffered a fatal reaction to anesthesia; her abortion was done while she was suffocating. Neither Ray Sienkiewicz nor any other referral counselor had been at the doorway to warn her, due to the success of the Wilson plan. The Medical Examiner's Report on the death of Mrs. Tremelling on August 20, 2000 (shown in the Selected Exhibits) was faxed to John McDougall, Sheriff of Lee County, Florida following the autopsy on August 22, 2000.

A reasonable, well-informed observer would expect that McDougall relayed this disturbing information to Charles Wilson immediately, warning him that felony charges carrying the penalty of life in prison against McDougall, Wilson, Reno and Clinton, might result from this death.

Several days later, on August 30, 2000, an opinion which appears to be hastily drafted was issued by the Court of Appeals in the *Raney v. Aware Woman Center For Choice, Inc.*, 224 F. 3d 1266 (11th Cir. 2000) case, which opinion has been used to exonerate Wilson and the others from FACE liability.

The next day, August 31, 2000, Charles Wilson and two other judges dismissed the appeal concerning bribery of the magistrate in the *McDougall* case. That decision was used to protect Wilson and the others in the present case.

Threats from McDougall caused Ray Sienkiewicz to be transferred to the Broadway clinic in the City of Ft. Myers. There, he was then threatened by police officers working for Larry Hart, the Chief of Police: he was told by an armed uniformed police officer that he would be arrested for trespassing if he ever returned to that facility.

As a result of the threats made against him by Larry Hart's officers, at the instigation of Clinton, Reno and Wilson, and Jill Babyak, manager of the abortion facility, Ray Sienkiewicz brought suit for FACE violations in the Middle District of Florida against all of these individuals.

B. The Proceedings Below

Ray Sienkiewicz amended his F.A.C.E. violation complaint in order to sue several of the defendants in

their individual capacities, reasoning that their official duties did not include felonious activities for personal gain.

The magistrate assigned to his case was the same one assigned to *Smith and Sienkiewicz v. McDougall*, U.S. Supreme Court Number 00-1365, the parallel case where the national effort to intimidate pro-life referral counselors was first presented to the federal courts.

Since the magistrate may have been paid protection money by McDougall to sabotage the first case, it was logical to believe that the magistrate would conduct himself the same way in the second case; in other words, it was reasonable to doubt his impartiality.

Thus, Ray Sienkiewicz asked the magistrate to disqualify himself. When the magistrate refused to do so, the counselor appealed.

While the counselor cited as a jurisdictional basis reasons for his appeal the need to protect the appearance of justice in a case of national importance, the Court of Appeals ignored this reason and dismissed the appeal. It later refused to change that decision.

This Court declined to review that decision.

Meanwhile, a court of appeals panel had entered what seems to be a hasty decision in *Raney v. Aware Woman,* 224 F.3d 1266 (11th Cir. 2000), on August 30, 2000, which decision would also appear to exonerate Wilson, Clinton and Reno in this present case. And the next day, August 31, 2000, a Court of Appeals panel which included Charles Wilson, dismissed the *Sienkiewicz v. McDougall* appeal , Supreme Court Number 00-1365, thus laying the foundation for protection of the magistrate and others in this case.

Predictably, both decisions were entered a few days after the Azima clinic fatality.

On March 22, 2001, the district judge dismissed the amended complaint with prejudice, misstating the allegations of this pleading in his order. Because of the national importance of this case, a petition was filed with the U.S. Supreme Court Case No. 00-1589, seeking case review prior to the Eleventh Circuit's ruling. It was denied.

Ray Sienkiewicz filed a timely appeal to the U.S. Court of Appeals, Eleventh Circuit. A few days after hearing oral argument, the U.S. Court of Appeals filed its opinion on December 19, 2001, upholding the district judge's dismissal of the case.

No petition for rehearing or rehearing en banc was filed.

This petition to the United States Supreme Court has been filed timely.

REASON FOR GRANTING THE WRIT

FIRST ISSUE

The Supreme Court should curtail widespread abuse of *Roe v. Wade* which has resulted in innumerable coerced and forced abortions by restoring FACE protection to referral counselors.

This Court declined to review *Jane Roe, II v. Aware Woman*, 253 F.3d 678 (11th Cir. 2001), a few weeks ago. That case involved an action brought for a forced abortion: it shines an unfavorable light on barbaric abortion clinic practices.

While the federal courts may award Jane Roe, II substantial damages for this atrocity, they can never give her baby back. A fundamental difference, then, exists between the role of the Courts, indeed the entire federal system, in dealing with prevention of abortion as opposed to forced abortion.

For instance, a woman who is prevented from getting an abortion on Monday can call her local U.S. Attorney's office that day and a fleet of U.S. marshals will escort her on Tuesday through the doorway of her chosen clinic. The federal government, then, can undo on Tuesday that which was done on Monday.

In the case of a woman forced to have an abortion on Monday, her calls to the local federal authorities reporting this crime may possibly result in criminal prosecution of the wrongdoer. But the U.S. government is powerless to restore the baby to her womb. For her, there is no Tuesday.

Pregnant women are literally at the mercy of many people who may decide that their own interest is best served by forcing her to get an abortion. While the United States

Supreme Court has concerned itself with the protection of the lives and health of pregnant women consistently from *Roe v. Wade*, 35 L.Ed. 2d 147 (1973), to *Stenberg v. Carhart*, 147 L Ed 743 (2000), this concern is not shared by the many parties responsible for innumerable non-consensual abortions.

Obviously, such abortions are in the economic interest of the abortion clinic, its workers and the doctors with which it contracts. Health insurers know that it is cheaper to spend $300 to destroy an unborn child than to spend thousands on a live birth. Employees know that a day or two off from work is cheaper than maternity leave. And sexual predators know that if they take their 11 year old pregnant victims to abortion clinics, they are likely to escape the consequences of their crimes.

In other words, our Nation is plagued with non-consensual abortions. The real number may exceed 1,000,000 a year.

This tragedy for women represents a financial windfall for the abortion industry which is why it sought help from the "federal" respondents: referral counselors such as Ray Sienkiewicz were putting a lawful and loving stop to a great many non-consensual abortions.

Ray Sienkiewicz is entitled to be "in the facility", there at the Broadway abortion clinic; his right to be there was established *Marsh v. Alabama*, 66 S.Ct. 276 (1946), which decision defines his *forum* opportunities and *Jane Roe, II v. Aware Woman Center For Choice, Inc.*, (*supra*), as a matter of necessity for the protection of the lives and health of pregnant women.

The services that this referral counselor provides are of a reproductive health nature and so entitled him to federal

protection under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. §248 (FACE).

It should be noted that these referral counselors are not present at the doorway to shout protests or condemnation of any kind. They communicate in soft voices; often the conversation is in very low whispers, audible not for several feet but only for a few inches. When the response to "How can we help you?" is "He's got a gun. I'm so scared." or "I've got AIDS. What can I do?" , even the minimum distance approved by this Court in *Hill v. Colorado*, 147 L Ed 597 (2000), is far too great for referral counseling. A desperate young woman must be able to whisper in the ear of a referral counselor. There is no alternative to this kind of life and death, private communication.

This Court should allow Ray Sienkiewicz and those like him to once again receive the legal protection which is their due under FACE. In turn, these referral counselors, complying with the standards of *Schenck v. Pro Choice Network*, 519 U.S. 357 (1997), can provide a lifeline to the multitude of women being tricked, forced, coerced into unwanted abortions.

SECOND ISSUE

The Supreme Court should nullify the blueprint for avoidance of liability for nationwide criminal activity by top government officials which utilizes the appointment of a key participant to the U.S. Court of Appeals.

Our Constitution clearly demands good behavior from its federal trial and appellate judges. Article III §1, U.S. Constitution.

Congress has enacted provisions which may forestall prejudiced or biased judges serving on specific cases. 28

U.S.C. §455.

Moreover, this Court has declared that even the appearance of impropriety should be avoided by the federal courts. *Liteky v. United States*, 114 S.Ct. 1147 (1994). Here there is no question but that the influence or bias is caused by an extra-judicial source.

There is, however, no procedure available to Ray Sienkiewicz to save him from defeat in the federal trial and circuit court of appeal when he is suing an individual court of appeals judge for major wrongdoing within the judge's "home" circuit.

The trial court, including the magistrate as well as the district judge, knew that Charles Wilson could well spend the rest of his life in a position superior to them. A reasonable, well-informed person would expect that not only these particular judges would rule in Charles Wilson's favor, but that each and every magistrate and district judge - not only in the Middle District of Florida, but in all federal districts within the Eleventh Circuit - would likewise rule against him.

This belief would be buttressed by the manner in which the Court of Appeals had distorted both the law and the facts in related cases in order to create precedent favorable to Charles Wilson in the case at hand. *Raney v. Aware Woman Center For Choice, Inc.*, 224 F.3d 1266 (11th Cir. 2000).

In short, no reasonable person could expect Ray Sienkiewicz to prevail in the trial court or the U.S. Court of Appeals. There is only one court which can be expected to rule fairly and honestly here: the Supreme Court.

Had Richard Nixon and his associates had the cunning of the present "federal" respondents, then they might well have

weathered the storm of court proceedings which resulted from Watergate. Federal court rulings would likely have been more favorable had Charles Colson sat on the Court of Appeals for the District of Columbia. At least the average person would have expected that to be the case.

This Court determined in *United States v. Nixon*, 94 S.Ct. 3090 (1974), that our best interest required that the United States Supreme Court be the ultimate judge of important issues critical to the well being of this Nation - particularly when wrongdoing of our top executive officials was involved.

Nixon and company sought to evade responsibility for a politically-motivated burglary where no physical harm was done to anyone. Wilson, Reno and Clinton here seek to evade responsibility for the death of at least one woman and atrocities committed against millions of others as a pay-back to the abortion industry.

The deciding difference is that the appointment of Wilson to the U.S. Court of Appeals has been a brilliant - though diabolical tactic - which has so far been effective in shielding Wilson himself as well as Clinton and Reno from liability.

Unless the United States Supreme Court steps forward to review this case, an evil blueprint will exist which other presidents can use to evade responsibility for major criminal programs. All that *Liteky* stands for will be undermined.

THIRD ISSUE

The Supreme Court should resolve conflicts between the federal appeals circuits which favor the FACE protection of pro-abortion workers over those pro-life workers lawfully providing reproductive health services in

the same facility.

The maintenance worker at the abortion clinic in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), was protected from harm under the Freedom of Access to Clinic Entrances Act, *supra.* The Eighth Circuit reasoned that his services were necessary for the operation of the abortion clinic.

Here, Ray Sienkiewicz can show that the Broadway abortion clinic cannot be operated in a proper manner without his presence at the doorway. For that reason, there is a serious conflict in the interpretation of FACE by the Eighth and Eleventh Circuits.

Whether FACE requires that the reproductive health services such as counseling and referral be done by one who is actually inside the facility providing those services or whether it is sufficient for protection of the provider that the services simply be those which are to be utilized in the facility is not germane to this case: Ray Sienkiewicz was both prevented from serving personally in the facility and also from providing services that were to be utilized in this facility. 18 U.S.C. §248.

It is important to realize that under FACE the word "clinic" and "facility" are not synonymous. A "facility" is comprised of much more than is a "clinic". 18 U.S.C. § 248. Ray Sienkiewicz was never inside the clinic although he was inside the facility. The courts below have misstated the difference between these two nouns.

For one thing, the young women being brought to this facility have no way of learning that it is an abortion clinic until they have been taken inside and their opportunity to resist an abortion has been greatly reduced - - - unless Ray

Sienkiewicz is there at the doorway.

Also, these same young women will not learn of specific threats to their lives and health nor of local alternatives to abortion and other available resources in the community unless Ray Sienkiewicz is there at the doorway.

It is imperative that young women learn about the particular deficiencies and threats to their lives and health which are present inside the clinic before the door closes behind them. Thus it is essential that Ray Sienkiewicz or a referral counselor like him be there at the entrance, outside the doorway, though in the facility.

There can be no proper operation of this abortion clinic, or any other for that matter, without one or two referral counselors there at the doorway during business hours, offering needed information and help in a lawful and loving manner. At this post there in the facility, these counselors can discourage and minimize non-consensual abortions.

CONCLUSION

Ray Sienkiewicz, like a prophet of old reminding his Creator of His covenants, now stands before the United States Supreme Court.

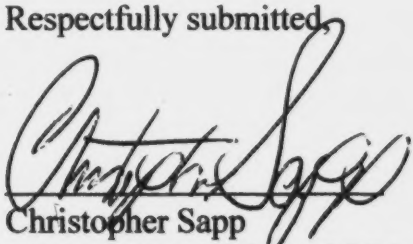
He is not bowed by the might of his opponents nor cowed by their influence over the federal judiciary. He trusts that this Court will continue to protect the lives and health of pregnant women. He expects this Court to keep its *Casey* promise:

> Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or force its

> reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all of those who will be so tested by the following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing.

Ray Sienkiewicz is ever respectful to this Court. Though he comes in the cloak of a humble petitioner for the wrongs done to him, at the same time he demands justice for all in this Nation with special emphasis for the unwilling victims of abortion. This Court must first review this case.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Case No. 2:00-cv-57-FtM-29DNF
(Filed March 22, 2001)

RAY SIENKIEWICZ,
Plaintiff,
vs.

LARRY HART, individually, CHARLES WILSON, JANET RENO, individually, WILLIAM J. CLINTON, individually, and JILL BABYACK.,
Defendants.

ORDER

This matter comes before the Court on the following dispositive motion: (1) Defendant Babyak's Motion to Dismiss (Doc. #7) filed June 28, 2000; (2) Defendant Larry Hart's Motion to Dismiss (Doc.#18) filed July 21, 2000; and (3) Defendants Charles Wilson and Janet Reno's Dispositive Motion to Dismiss, or, in the Alternative, for a More Definite Statement (Doc. #40), filed December 5, 2000. Plaintiff filed a Response to each motion to dismiss on July 24, 2000, August 4, 2000, and December 29, 2000, respectively. (Docs. #19, #23, #41).

Plaintiff is an anti-abortion activist who claims protection under the Freedom of Access to Clinic Entrances

Act (FACE), 18 U.S.C. §248. Because the Amended Complaint (Doc. #3), filed June 7, 2000, does not and cannot state a claim upon which relief may be granted, the motions to dismiss will be granted and the Amended Complaint will be dismissed.

I. Motion to Dismiss Standard

In deciding a motion to dismiss, the Court must accept as true all factual allegations in the Complaint. Hughes v. United States, 110 F.3d 765, 767 (11th Cir. 1997); Brown v. Crawford County, Ga., 960 F.2d 1002, 1010 (11th Cir. 1992). The Complaint must be viewed and all reasonable inferences must be made in favor of the plaintiff. Sawinski v. Bill Currie Ford, Inc., 866 F.Supp. 1383, 1385 (M.D. Fla. 1994); citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A Complaint should not be dismissed unless it appears beyond that plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted); Neal v. Fulton County Bd. Of Educ., 229 F.3d 1069, 1072 (11th Cir. 2000), reh'g denied, ___F.3d___ (11th Cir. 2000); Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231-32 (11th Cir. 2000). Federal Rule of Civil Procedure 8 requires only that plaintiff set forth a short and plain statement of the claim that will give defendants fair notice of the claim and the grounds upon which it rests. Conley v. Gibson, 355 U.S. at 47. However, dismissal is warranted under Fed.R.Civ.P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, Ga., 960 F.2d at 1009-10.

II. Factual Allegations

Plaintiff Ray Sienkiewicz (plaintiff or Sienkiewicz) is a "pro-

life referral counselor" who provides or seeks to provide counseling of women and men as to the spiritual, moral, medical, physical and psychological health aspects of adoption and abortion; the nature of this particular [abortion] facility; the needs of the individuals approaching or leaving the facility; and offering written and verbal referral information concerning pregnancy and the termination thereof, especially referral to local resources offering alternative solutions to abortion." (Doc. #3, ¶¶ 29, 34). Plaintiff claims that his activity is protected by FACE, 18 U.S.C. §248, and that defendants violated his rights under FACE.

The crux of plaintiff's factual allegations of misconduct are plead "on information and belief." Plaintiff alleges that in December, 1998, the abortion industry became upset when a federal district court in Tampa, Florida, refused to issue summary judgment for the abortion clinic in a certain case, and pressured the Clinton administration to stop any federal protection of pro-life referral counselors at the entrances of abortion clinics. (Doc. #3, ¶¶ 17, 18). Plaintiff alleges that Charles Wilson, then the United States Attorney for the Middle District of Florida, advised Attorney-General Janet Reno that the pro-life referral counselors were not violating any laws and were evidently protected under FACE. (Doc. #3, ¶ 19). Plaintiff alleges that despite this legal opinion, then-President Clinton, Attorney-General Reno, and then-United States Attorney Wilson developed a political solution to stop the pro-life referral counselors. (Doc. #3, ¶20). Plaintiff alleges that defendants agreed to stop pro-life referral counselors, with the aid of local abortion clinics, by using local police officers to threaten and intimidate the pro-life referral counselors. (Doc. #3, ¶20). Plaintiff alleges that in the Spring of 1999, then-President Clinton agreed to appoint then-United States Attorney Wilson to the United States Court of Appeals for the Eleventh Circuit for developing this program by which various

United States Attorneys would obtain the cooperation of local police chiefs (such as defendant Larry Hart, the police chief of Ft. Myers, Florida) to intimidate pro-life referral counselors when requested by abortion clinic personnel (such as Jill Babyack, an abortion clinic employee) and to ensure the legal and political success of the program. (Doc.#3, ¶21). Plaintiff alleges that the purpose of the program of intimidation was to prevent pro-life referral counselors from performing their services at abortion facilities. (Doc. #3, ¶ 22) This program is alleged to have been a political favor to the abortion industry, "an important political ally of the Clinton Administration." (Doc.#3, ¶22). Plaintiff alleges that defendants were acting "in the political arena" and not within the scope of their official capacity. (Doc. #3, ¶24).

The specific claim in this case involved an abortion clinic in Lee County, Florida, the Fort Myer's Women's Health Center, Inc. (the abortion clinic). (Doc. #3, ¶ 30). Plaintiff alleges that the only place to carry on private, non-threatening, pro-life referral counseling with persons approaching or leaving this particular facility is the sidewalk between the parking lot and the doorway. (Doc. #3, ¶31). Plaintiff also alleges that the only place to hand out written referral information about local pro-life resources to the people entering and leaving this abortion facility is on the sidewalk. (Doc. #3, ¶ 32). Plaintiff alleges that on October 21, 1999, and a number of times thereafter, he sought to perform his services as a pro-life referral counselor on the sidewalk and parking lot. (Doc. #3, ¶34). Plaintiff alleges that because of his activities he was unlawfully threatened with physical removal and intimidated by defendants, acting through a armed Fort Myers policeman, and prevented from providing his services at the abortion facility. (Doc. #3, ¶¶ 35, 36). Plaintiff estimated such violations had occurred 50 times per week (Doc. #3, ¶ 40), and alleges that he continues to reasonably fear such conduct by defendants if he sought to

perform his services in the future. (Doc. #3, ¶ 37).

III. Legal Arguments

The Freedom of Access to Clinic Entrances Act of 1993, 18 U.S.C. §248 (c), provides civil remedies for persons wronged by the prohibited conduct outlined in § 248 (a)(1). [1] In Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995), the Court upheld the constitutionality of FACE, rejecting a number of constitutional challenges brought by anti-abortion activists. Now that the statute has been upheld, plaintiff seeks to bring his anti-abortion counseling within the protection it affords.

Raney v. Aware Woman Center For Choice, Inc., 224 F.3d 1266 (11th Cir. 2000), held that "A FACE Act action may be brought 'only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . . .'" Id. at 1268; citing, 18 U.S.C. § 248(c)(1)(A) (emphasis in original)." Raney noted that the statute defines "facility" to include "a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located. ." Id. at page 1268; citing 18 U.S.C. § 248 (e)(1) (internal quotations omitted). Raney concluded that "[t]he 'reproductive health services' protected under the statute must be provided 'in a hospital, clinic, physicians office, or other facility . . . .'" Id. at 1268-69; citing, 18 U.S.C. § 248 (e)(5). Raney stated:

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[1] 18 U.S.C. §248(a)(1) provides that whoever by "force or threat of force or by physical obstruction, intentionally injures,. . . any class of persons from, obtaining or providing reproductive health services . . . shall be subject to penalties.

> By requiring that the person bringing a FACE action be seeking or providing reproductive health services in a facility, Congress recognized the difference between trained professionals who work in credentialed facilities and unregulated volunteer counselors who are not attached to recognized providers of reproductive healthcare.

Id. at 1269.

Plaintiff alleges that the sidewalk in front of the abortion clinic constitutes part of the facility; therefore, his pro-life counseling services are covered by FACE. The Court disagrees. Contrary to plaintiff's argument, Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995), did not establish that "the route traveled to the entrances of abortion clinics is part of interstate commerce and thus must be open to the public." (Doc. #3, ¶ 10). In Raney, the Eleventh Circuit stated that on each of the incidents plaintiff was "standing on a sidewalk outside of the Woman Center clinic. He therefore can claim neither that he was in a facility nor that he was offering the type of reproductive health services which the FACE Act protects access." Raney v. Aware Woman Center for Choice, Inc., 224 F.3d at 1269.

Accordingly, it is now

ORDERED:

1. Defendant Babyack's Motion to Dismiss (Doc. #7) is **GRANTED**; Defendant Larry Hart's Motion to Dismiss (Doc. #18) is **GRANTED**; and Defendants Charles Wilson and Janet Reno's Dispositive Motion to Dismiss or, in the Alternative, for a More Definite Statement (Doc. #40) is **GRANTED** as to the Motion to Dismiss and **DENIED** as to the Motion for More Definite Statement.

2. Plaintiff's Amended Complaint (Doc. #3) is **DISMISSED with prejudice** as to the defendants Larry Hart, Justice Charles Wilson, Attorney-General Janet Reno and Jill Babyak. Since the Amended Complaint fails to state a legal claim, it is also dismissed as to former-President William J. Clinton.

3. The Clerk is **DIRECTED** to enter a Judgment dismissing the case with prejudice and close the file.

DONE AND ORDERED at Ft. Myers, Florida this 22nd day of March, 2001.

/s/
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record
Diane Gosser, Courtroom Deputy Clerk
Donna Howard, Judicial Assistant

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-11774

D.C. Docket No. 00057-CV-FTM-29
(Filed December 19, 2001)

RAY SIENKIEWICZ,

Plaintiff-Appellant,

versus

LARRY HART, individually, and as Chief of Police for the City of Fort Myers, Florida, JILL BABYACK, CHARLES WILSON, JANET RENO, individually, JOHN ASHCROFT, individually, and as Attorney General of the United States, WILLIAM J. CLINTON individually, GEORGE W. BUSH, individually and as President of the United States,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before BLACK and HULL, Circuit Judges, and

HANCOCK*, District Judge.

PER CURIAM:

Plaintiff-Appellant Ray Sienkiewicz ("Sienkiewicz") filed a complaint seeking damages and injunctive relief under the federal Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, in the United States District Court for the Middle District of Florida. Sienkiewicz asserted that he was prevented by defendants from providing "pro-life referral counseling" to women on a public sidewalk between the parking lot and doorway of an abortion clinic in Ft. Myers, Florida, constituting actionable interference with his ability to provide "reproductive health services . . . in a facility that provides reproductive health services" under FACE. 18 U.S.C. §§248(a)(1),(c).[1] The district court granted the defendants' motions to dismiss Sienkiewicz's complaint for failure to state a claim upon which relief could be granted. After review and oral argument, we affirm the district court's dismissal of Sienkiewicz's complaint.

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*Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation

[1]The full text of the relevant provisions of FACE read:

(a)Prohibited activities - Whoever -
(1)by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c) . . . .
(c) Civil remedies. -
(1)Right of action. -
(A) In general. - Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection(a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . . .

On appeal, Sienkiewicz first argues the District Court's decision should be reversed because a reasonable person would believe the district court judge was incapable of remaining impartial in this case due to "extrajudicial influences."[2] See Liteky v. United States, 510 U.S. 540 (1994). We decline to consider this allegation because Sienkiewicz did not file a motion to recuse the district judge whose order is the subject of this appeal nor a motion for reconsideration after the district court issued its opinion. In addition, no issue or order concerning bias was referenced in his notice of appeal. See Bivens Gardens Office Bldg., Inc. V. Barnett Banks of Florida, Inc., 140 F. 3d 898, 913 (11th Cir. 1998) (holding timing of motion to disqualify judge is not mere "strategic decision"; even if post-judgment motion is made); McKinney v. Pate, 20 F.3d 1550, 1562 (11th Cir. 1994) ("a challenger must object to a biased judge in a motion to recuse before trial or as soon as the alleged bias is discovered; again, the penalty for failing timely to object is waiver of objection"). Sienkiewicz has not demonstrated that any purported bias could not have been identified prior to his submission of briefs to this Court.

(e)Definitions. - As used in this section:

(1)Facility. - The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located . . .

(5)Reproductive health services. - the term "reproductive health services" means reproductive health services provided in a hospital, clinic, physicians office, or other facility, and includes medical, surgical, couselling or referral services relating to the human reproductive system including services relating to pregnancy or the termination of a pregnancy.

18 U.S.C. § 248.

[2]Sienkiewicz alleges the following in support of his argument: (1) the district court in this matter shares a courthouse with the magistrate judge who Sienkiewicz sought unsuccessfully to disqualify from this case; (2) other district courts in the Middle District of Florida have "misstated critical facts and engaged in unseemly name-calling" of plaintiffs in related cases, including Sienkiewicz; (3) the district court here used perjorative language to refer to Sienkiewicz and committed legal errors in dismissing his complaint; and (4) one of the defendants in this case, Charles R. Wilson, is a member of this Court

To the extent Sienkiewicz's argument can be construed as an appeal on the merits of the district court's dismissal of his complaint, we conclude the district court also reached the proper conclusion. This Court reviews the grant of a motion to dismiss de novo. ABATE of Georgia, Inc. v. Georgia, 264 F. 3d 1315, 1315 (11th Cir. 2001). We must accept all of the factual allegations in the complaint as true and ask whether, in these circumstances, dismissal of the complaint was appropriate. Monzon v. United States, 253 F.3d 567, 569-70 (11th Cir. 2001) (quoting Berkovitz v. United States, 486 U.S. 531, 540 (1988). Sienkiewicz is correct that FACE does not discriminate based on viewpoint. See Jane Roe, II v. Aware Women's Center for Choice, Inc., 253 F.3d 678, 681 (11th Cir. 2001) (holding that for purposes of FACE, it matters not whether" woman who was allegedly prevented from leaving abortion clinic wanted to seek medical care, go elsewhere for abortion or save the pregnancy because FACE covered all such services that "fall within the statutory definition of "reproductive health services"'), Cheffer v. Reno, 55 F. 3d 1517, 1521 (11th Cir. 1995) (concluding that FACE is "not content or viewpoint based"). But he cannot overcome the fact that FACE does not provide a right of action to someone not seeking to provide services "in a facility that provides reproductive health services." 18 U.S.C. §248 (c)(1)(A).

Under the prior panel precedent rule, we are bound by earlier panel holdings unless and until they are overruled en banc or by the Supreme Court. EEOC V. W&O, Inc., 213 F.3d 600, 623 n.15 (11th Cir. 2000). This Court resolved this issue in Raney v. Aware Woman Center For Choice, Inc., 224 F. 3d 1266 (11th Cir. 2000), where an anti-abortion protestor was prevented from counseling women as they entered or exited a facility that performed abortions. This Court held that in these circumstances an anti-abortion protestor could not state a cause of action under FACE:

> A FACE Act action may be brought "only by a person involved in providing or seeking to provide, or

> obtaining or seeking to obtain, services *in a facility* that provides reproductive health services . . ." 18 U.S.C. §248 (c)(1)(A) (emphasis added). The statute defines "facility" to include a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located." 18 U.S.C. §248(e)(1). The "reproductive health services" protected under the statute must be provided "in a hospital, clinic, physician's office, or other facility . . . ." 18 U.S.C. §248(E)(5).
>
> By requiring that the person bringing a FACE action be seeking or providing reproductive health services in a facility, Congress recognized the difference between trained professionals who work in credentialed facilities and unregulated volunteer counselors who are not attached to recognized providers of reproductive healthcare. On each of the three occasions when Raney was arrested for violating the [] injunction, he was standing on a sidewalk outside of the Aware Woman clinic. He therefore can claim neither that he was in a facility nor that he was offering the type of reproductive health services to which the FACE Act protects access.[3]

224 F.3d at 1268-69.

Sienkiewicz also contends that he should be permitted to amend his complaint to meet the new pleading standard allegedly set when FACE was "completely rewritten" by this Court in Raney. This contention, like Sienkiewicz's recusal request, was never raised before the district court and cannot be heard here for the first time. See Burger King Corp. V. Weaver, 169 F.3d 1310, 1318 (11th Cir. 1999) (noting that "a

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[3] Because this Court concluded Raney could not state a claim under FACE, we did not determine whether he qualified as a counselor under the law. 224 F.3d at 1269 n.1.

trial court is not required sua sponte to grant leave to amend prior to making its decision" and affirming dismissal without leave to amend when no motion for leave to amend had been made).

Assuming the district court's dismissal with prejudice constituted a denial of leave to amend, no error was committed. We review the denial of a motion for leave to amend for abuse of discretion. Jennings v. Bic Corp., 181 F.3d 1250, 1254 (11th Cir. 1999). While permission to amend a complaint should be granted under Federal Rule of Procedure 15(a) "when justice so requires." *If* Raney added any new elements to a cause of action under FACE, it did not deprive Sienkiewicz of the "opportunity to re-plead his cause of action." Sienkiewicz filed his complaint on February 7, 2000, and was permitted an amendment as of right on June 7, 2000. This Court decided Raney on August 30, 2000, almost seven months prior to the district court's ruling on March 22, 2001, that is appealed here. At no time during - or even after - that period did Sienkiewicz seek permission from the district court to amend his complaint for the second time, though he was certainly aware of the decision in Raney.[4] See Long v. Satz, 181 F.3d 1275, 1279, 1290 (11th Cir. 1999) ("Failure to properly request leave to amend, when she had adequate opportunity and time to do so, precludes the plaintiff's argument on appeal that the district court abused its discretion by denying her leave to amend her complaint."). We believe Raney did not add any new elements to a FACE cause of action, making any proposed amendment in this case futile. Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001) (noting amendment need not be permitted when there has been either "undue delay" or "amendment would be futile")

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4 Sienkiewicz's counsel here was plaintiff's counsel of record in Raney and recieved a copy of the decision directly from this Court. In addition, Defendant Larry Hart served on and filed a copy of Raney as supplemental authority for his motion to dismiss on September 5 and 6, 2000, respectively.

Therefore, we affirm the district court's order dated March 22, 2001, dismissing Sienkiewicz's complaint.

AFFIRMED.